MOHD. ZAMRI KHALID & ANOR.

v.

JOHARI KHALID & ANOR.

HIGH COURT MALAYA, RAUB
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 10 OF 1979]
16 NOVEMBER 1983

TORT: *Negligence - Motor accident - Whether defendant liable - Contributory negligence - Whether plaintiff liable.*

The 1st plaintiff was a pillion rider on a motorcycle which collided with the motorcycle driven by the 1st defendant resulting in the injuries which had left the 1st plaintiff in complete paralysis of both his lower limbs and the right upper limb. The case for the 1st plaintiff was that the motorcycle on which he was a pillion rider had negotiated a right-hand bend when it was suddenly confronted by a police road block. The 1st plaintiff's motorcycle collided with the 1st defendant motorcycle which was right across the road. The 1st defendant denied that there was a road block and alleged that the 1st plaintiff's motorcycle collided with another motorcycle before it collided into him, and that the 1st plaintiff had already been thrown off his motorcycle before it collided into him.

At the beginning of the trial both parties had agreed on the quantum subject to liability being proved.

Held:

[1] The 1st defendant was liable for the accident. The Court was satisfied that the 1st plaintiff was a consistent and truthful witness. The evidence of the 1st defendant, on the other hand, was riddled with contradictions and discrepancies.

[2] Neither the 1st plaintiff, nor the rider of the motorcycle on which the 1st plaintiff was a pillion rider, had contributed to the collision. What is done or omitted to be done by the plaintiff in the urgency of the moment at the time of an accident caused by the defendant cannot be fairly treated as negligence. *(Govinda Raju & Anor. v. Laws* [1966] 1 MLJ 188 at 190).

[Judgment to 1st plaintiff]

Cases referred to:
Govinda Raju & Anor. v. Laws [1966] 1 MLJ 188

Legislation referred to:
Evidence Act 1950, s. 114 illus.(g)

For the plaintiffs - Christopher Foo; M/s. Murphy & Dunbar
For the defendants - P. M. Mahalingam; Senior Federal Counsel

JUDGMENT

Shaik Daud Ismail J:

At the outset of the trial, subject to liability being proved, both parties agree on the quantum as follows:

Special damages at RM100,000 with interest at 4% per annum from the date of the accident to the date of judgment.

General damages at RM200,000 with interest at 8% per annum from the date of service to the date of judgment.

The case for the 1st plaintiff Mohd. Zamri bin Khalid is that on 21 August 1976 he was a pillion rider on a motorcycle CA 9349 ridden by one Saleh bin Razak (now deceased) travelling in the direction of Triang from Temerloh. The said motorcycle had negotiated a right-hand bend when it was suddenly confronted with what he said was a police road block. According to the 1st plaintiff he saw a police vehicle stationary on the road on his right, a police motorcycle was stationary and perpendicular to the police vehicle and a civilian motorcycle also stationary between the police vehicle and the police motorcycle. The 1st plaintiff said that the police motorcycle BAB 8068 was right across the road and in the path of the plaintiff's motorcycle. All these were seen by the 1st plaintiff just 10 meters after his motorcycle negotiated the bend.

What transpired thereafter was described by the 1st defendant in his evidence on oath both by words and by actions with the help of toy models. The plaintiff's motorcycle collided first with the front off-side handle bar of the civilian motorcycle CD 4976, veered to the left and then hit the offside middle part of the police motorcycle at an almost right angle (as is shown by him by using the models). According to the 1st plaintiff, on rounding the bend and on seeing the scenario as described earlier, the plaintiff's motorcycle tried to take some evasive action by trying to squeeze through the gap between the civilian and the police motorcycles but failed resulting in the accident.

Incidentally this accident has left the 1st plaintiff, a young man of 21 years of age, in complete paralysis of both his lower limbs and the right upper limb. He in fact gave evidence sitting in a wheel chair from the well of the Court.

What impressed the Court most was the consistency with which 1st plaintiff gave his version of the accident both in examination-in-chief and in cross-examination. He never once wavered and described the accident which occurred some six years ago consistently. Not only is he consistent with how the accident occurred but his estimation of distances also showed this same consistency. After seeing his demeanour and hearing him give evidence, I am satisfied that 1st plaintiff is a consistent and truthful witness.

The defence version of how the accident occurred is in complete variance with that of the 1st plaintiff. The 1st defendant, Johari b. Khalid (DW4) in his evidence stated that on 21 August, 1976 he was attached to the Temerloh Police Station in the traffic division. On that morning he was in a party of traffic policemen and they went to Triang town to check on motorcycles and other vehicles. The leader of the party was one Inspector Ismail b. Abd. Rahman (DW2) but in cross-examination he said that it was one Inspector Abdul Aziz b. Hj. Ariffin (DW6). According to 1st defendant, after the operation in Triang they all left in a convoy heading back to Temerloh Police Station. 1st defendant was riding a police motorcycle BAB 8068. The convoy consisted of the police landrover driven by Cpl. Md. Hussain b. Sulaiman (DW1) as the lead vehicle followed by another policeman on a police motorcycle. Behind this policeman was 1st defendant riding motorcycle BAB 8068 and behind him 2 other policeman also on motorcycles. 1st defendant said they were all riding in a single file about 10 to 15 yards behind each other. 1st defendant denied that a road block had been set up at the 54 1/4 milestone Triang/Temerloh road. While they were all in this convoy 1st defendant said he saw 2 motorcycles coming from the opposite direction. One was CD 4976 and the other CA 9349 was behind. 1st plaintiff was the pillion rider of motorcycle CA 9349. 1st defendant said that when the motorcycle CD 4976 came near him, the rear motorcycle that is

CA 9349 collided into the rear of the first motorcycle that is CD 9376. After this collision the plaintiff's motorcycle CA 9349 came across the road diagonally towards the path of the defendant resulting in the second collision between motorcycle CA 9349 and BAB 8068. According to 1st defendant before the plaintiff's motorcycle hit his own motorcycle, the pillion rider i.e. 1st plaintiff had already fallen off the motorcycle in the middle of the road. 1st defendant said he could not avoid the accident as it happened too fast. As a result of this second collision 1st defendant was thrown off and over his motorcycle and landed on his face resulting in minor injuries and losing 2 front upper teeth.

As with the 1st plaintiff, 1st defendant was the only one who gave evidence of how the collision took place. The other witnesses called by the defence are all those police personnel who were in the police landrover. None of them saw the collision and hence could not shed any light as to how the collision took place. I presume they were merely called by the defence to confirm the version given by the 1st defendant that they were all travelling in a convoy towards Temerloh and they never stop to put up a road block.

Although the manner in which the collision occurred is a crucial matter to be decided but in this particular case the position of the vehicles and their directions they were heading before the collision is the crucial factor. As I said earlier on this the evidence by the 1st plaintiff and that of the 1st defendant is in complete variance. The question is whose version is the more probable version and to be believed looking at all the surrounding circumstances. As I also said earlier, I was impressed with the consistency with which the 1st plaintiff gave evidence and could not find any material contradictions with his evidence. On the other hand I cannot say the same with the evidence given by 1st defendant and some of his police witnesses. To begin with, I find that 1st defendant has not been consistent as he appeared to be unsure of certain facts and his evidence, I find, is riddled with contradictions and discrepancies.

In the first place 1st defendant's police report made after the collision contradicted that of his oral evidence in Court. On my scrutiny of the report in the agreed bundle at page one, there is nowhere mentioned about 1st plaintiff's motorcycle colliding with the motorcycle CD 4976. In fact 1st defendant in his evidence is trying to show that 1st plaintiff's motorcycle in first colliding with CD 4976 resulted in the second collision with his motorcycle and that he had nothing to do with the first collision. In his report 1st defendant merely said that a motorcycle "straightaway cut in front of me and collided into my motorcycle." The impression I get from this is that there was no other motorcycle or vehicle but that his motorcycle while travelling on its side of the road suddenly came across his path and collided into his motorcycle. The explanation given by 1st defendant on this contradiction is rather weak especially coming from a trained police personnel. The fact of the first collision would be uppermost in the mind of 1st defendant when he lodged his report because, as I mentioned earlier, according to him it was as a result of the first collision that the second collision occurred.

According to the 1st defendant he had sight of those 2 motorcycles when they were as far away as 100 feet in front of him and he could not say whether before the collision, the rear motorcycle overtook the front motorcycle. This bit of evidence in fact expressly contradicted clause 3(b) of his own Statement of Defence. The inconsistency of the first defendant's evidence became very evident when he described the times and distances between his motorcycle and the 2 oncoming motorcycles. From his evidence on this, as was elaborated by learned counsel for plaintiff in his summing up, it would be evidently clear that the 2

oncoming motorcycles had already passed him when the alleged collision took place. I find it quite unacceptable for a policeman to be that inaccurate as was with the 1st defendant. In considering the injuries caused to 1st defendant as a result of the collision as described by him, I find it very hard to believe. According to him he was travelling between 40 to 45 m.p.h. and he emphasised the fact that the other 2 motorcycles were travelling quite fast. On impact he was thrown off and over his motorcycle and landed on his face. In that circumstances, would he merely lose 2 front teeth and some minor injuries? The manner in which he described the collision I would have expected him to suffer much more severe injuries than merely losing 2 front teeth. According to 1st defendant in front of him some 15 to 20 yards away was another policeman on a motorcycle also in the convoy and yet this policeman was not called to testify and neither was the policeman allegedly behind him also some 15 to 20 yards away. I would have thought that both the policemen in front and the one at the rear of 1st defendant would have shed more light on how the collision took place rather than all those in the land rover who testified that they never saw how the collision took place and yet these 3 policemen were never called and no explanation for their absence was ever given. The only conclusion I can arrive at on this is to invoke s. 114 (g) of the Evidence Act 1950 against the defence. DW3 a so-called independent witness was called to enhance the evidence of the convoy. He testified that earlier a police land rover and some policemen on motorcycles overtook him some 15 to 20 minutes before the collision. DW3 did not see the collision but arrived on the spot after it had occurred. To my mind DW3's evidence does not in any way enhance the fact that there was no road block at the scene of the collision. It must be emphasised at this stage that by the phrase road block is not meant to refer to a proper and the usual road block put up by the police with barriers and so forth. This road block as described by the plaintiff appeared to be the *ad hoc* road block often put up by the police at any particular spot they deem fit. It is the contention of the plaintiff that just before the collision the defendant and his team of police personnel had stopped the motor cycle CD 4976 and thereby blocking the road just after a bend in such a manner as not to give anyone coming round the bend a chance to stop in time. Even if the evidence of DW3 is accepted it does not rule out the probability of the so-called *ad hoc* road block. It is very surprising that 1st defendant in cross-examination vividly remembers that he had earlier overtaken only one car (DW3's car) and even remembers the number of that car. At first he said he remembered the number of the car he had overtaken as being NF 4592 and later he admitted that he only knew about the number in Court that day.

1st defendant's description of the damage to his motorcycle appears also to be contradicted with report of damage issued by the Jabatan Kerja Raya and the road transport department. (See agreed bundles page 7 and 10). Looking at these 2 reports, the damages to his motorcycle could not be sustained if the collision occurred as he described it. On the contrary, it is more consistent with the version given by 1st plaintiff.

DW1 in trying to support the defence, failed miserably except to corroborate 1st defendant about not stopping for an *ad hoc* road block. DW2 also could not shed any light except to deny that they had stopped for an *ad hoc* checking. One significant evidence of DW1 is the fact that he said there were no vehicles between the land rover and the fallen motorcycles. This contradicted the evidence of 1st defendant and DW1 who both said that there was another policeman on a motorcycle between the land rover and 1st defendant. As I mentioned earlier all the defence witnesses called, with the exception of DW3, were all police personnel in the land rover who did not see the collision. The witnesses that mattered and not called were the 2 police motorcyclists riding in front of and behind 1st defendant.

One significant witness called by the defence took not only the Court but all parties by surprise and that is DW5. He was called apparently as the rider of motorcycle CD 4976 but he denied that he was the rider of motorcycle CD 4976 and also denied that he had made a police report or given a statement to anyone to that effect. DW5 alleged that it was his elder brother, who is now in Sabah, who met with an accident in 1976 and not he. He even went so far as to say that he was interviewed by the very Senior Federal Counsel who had conduct of the defence case at the trial and he had told the Senior Federal counsel that he, DW5, was not the rider of the motorcycle and yet he was called and no explanation was put forward as to how or why this happened.

In view of all the contradictions, discrepancies and uncertainties in the evidence of the defence the only irresistable conclusion I feel I can arrive at is that the whole incident could not have happened as described by 1st defendant. The only reason I can think of as to why only those in the land rover were called to testify for the defence although they did not help much, is to lend credence to the fact that there was no *ad hoc* road block and that they were all in a convoy. In view of the nature of their testimony I find even this hard to believe. I accept on the facts adduced in this case as a whole that the version given by the 1st plaintiff as to how the accident occurred is more probable and reasonable version.

Next I have to consider on the evidence available whether the 1st plaintiff and the rider of motorcycle CA 9349 in any way contributed to this collision. According to 1st plaintiff as soon as the deceased rider of CA 9349, of which he was the pillion, rounded the bend some 30 to 35 feet in front of them 1st plaintiff saw this "road block" and there was nothing that could be done to avoid the collision. Even travelling at 40 to 45 m.p.h. it would have taken one or two seconds before they reach the obstruction. There was no direct evidence as to how fast motorcycle CA 9349 was travelling. There was no warning either before the bend or immediately after the bend of the impending danger and suddenly being confronted with the danger directly in front of him the deceased rider could do nothing else. 1st plaintiff being a pillion rider could do much less. I am of the view that even if one could attribute some negligence on the part of the deceased rider this could not be extended to the 1st plaintiff who was just a pillion and had no control of the motorcycle. As was said by Raja Azlan Shah J. (as he then was) in *Govinda Raju & Anor. v. Laws* [1966] 1 MLJ 188 at 190:

> To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances ...
>
> What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence.

In the present case the 1st plaintiff stated that faced with the situation the deceased tried to squeeze through a gap between the civilian motorcycle and the land rover. Ordinarily this would not be what an ideal rider of a motorcycle would or should do but in the agony of the moment and faced with the danger, the deceased rider must have thought that would be his best action but unfortunately it proved to be the reverse.

In view of this I am of the view that no blame is to be attached either to the deceased rider or to the 1st plaintiff but the defendant is to be wholly blamed for putting this danger in the path of the deceased rider. It is quite a common practice to see police road blocks being put immediately around a bend on a road without putting any form of warning signs of the danger ahead, thereby putting other road users in peril. This they must stop or pay for the

consequence of their wrongful act. As a result of this collision the 1st plaintiff, a young man, has now lost the use of both his lower limbs and has to be dependent on assistance for his day-to-day living.

As quantum has earlier been agreed upon by the defendants, I gave judgment to the plaintiff on the agreed damages for special and general damages and costs.

Also found at [1984] 1 CLJ 183